W.P. No. 1174 of 2013

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Debashis Moulik
Vs.
Assistant Commissioner of Income Tax, Circle-37, Kolkata

Appearance:

Mr. R.N. Dutta, Adv., Ms. Sutapa Roychoudhury, Adv.
.. for the petitioner

Ms. Mamta Bhargav, Adv.
... for the Respondent

Heard On: - 18.09.2014

Judgement On: - 29.09.2014

I.P. MUKERJI, J.

Sections 147 and 148 of the Income Tax Act, 1961 and the judgment of the Hon'ble Supreme Court of India in **GKN Driveshafts (India) Ltd. vs. Income Tax Officer** reported in **(2003) 259 ITR 19 (SC)** are involved in this case.

In the above case the highest Court opined, in the form of a clarification, that when a notice under Section 148 of the said Act was issued, the proper course of action for the assessee was to file a return and if he so desired to seek reasons for issuing the notice. The Assessing Officer was bound to furnish reasons within a reasonable time to which the assessee had the right to file objections. The Assessing Officer was bound to dispose of the issue by passing a speaking order.

The writ petitioner/assessee on 15th July, 2013 received a notice dated 4th July, 2013 under Section 148 of the said Act for the assessment year 2009-10. By a letter dated 19th July, 2013 he challenged the legality of the notice and asked for reasons. Furthermore, the Income Tax authorities were requested to treat the return of income filed on 29th September, 2009 as a return in compliance with the said notice.

On 31st October, 2013 the department issued a Section 142 (1) of the said Act to the writ petitioner.

The grievance of the writ petitioner is this. Till date the respondents have not communicated to him the reasons to him in terms of the above judgment of the Supreme Court.

What follows from an examination of the above Supreme Court decision is that at the time of issuance of a notice under Section 148 of the said Act, the Assessing Officer should have reason to believe that any income chargeable to tax had escaped assessment for any assessment year. There is no requirement to append the reasons for such belief in the notice under Section 148. However, the assessee on receipt of the notice is required to file a return and if he so desired to make a request to the Assessing Officer to furnish the reasons for reopening of his assessment. The assessee is entitled to counter those reasons by filing a reply. This has to be adjudicated upon by

the Assessing Officer by a reasoned order, before he proceeds to make the assessment.

The reasons of the department are disclosed in paragraph 9 of their affidavit-in-opposition as follows:

> "***For the better appreciation of the issue involved in this case, the recorded reasons to believe is reproduced as under.***
>
> ***i) It was observed from the assessment records that the following expenses which were debited to the accounts in respect of M/s Prantik would attract the provision of deduction of tax at source under section 194C of the Income Tax Act 1961:***
>
> ***a. Printing charges Rs. 1,10,96,704/-***
>
> ***b. Binding Charges Rs. 97,74,436/-***
>
> ***c. Lamination Charges Rs. 17,00,684/-***
>
> ***d. Advertisement Rs. 99,31,351/-***
>
> ***ii) It was also observed from the assessment folder that in respect of some ledger accounts viz M/s. Trirupati Binding Works. M/s. Maa Tara Book Binding Works & Advertisement A/cs for the A.Y 2009-10, no deduction of TDS was made at the time payments;***

iii) Verification of the assessment records revealed that a sum of Rs. 10,77,243/- was debited as Royalty in the profit and loss account of M/s Prantik for the A.Y.2009-2010, while as per the computation of total income for the A.Y. 2009-2010 it was revealed that the assessee had included a sum of Rs. 3,18,525/- as Royalty received from M/s. Prantik in his total income. Hence, the balance amount of Royalty debited to trading A/cs of M/s. Prantik for the year ended 31/03/2009 of Rs. 7,58,718/- (Rs. 10,77,243/- Rs. 3,18,525/-) was required to be disallowed under section 40(a)(ia) as tax was not deducted at sources under section 194J.

iv) Perusal of ledger A/cs of Motor car Expenses for the period 2008-2009 revealed that a sum of Rs. 26,900/- was paid in cash, which is inadmissible expenditure."

The department's case is that by their letter dated 19th November, 2013 the above reasons were attempted to be served upon the petitioner. It was refused by them. This in turn is disputed by the petitioner.

Now, Mr. Dutta, learned advocate for the petitioner argues that on the basis of the reasons disclosed by the department in their affidavit-in-opposition, no case for reopening of the assessment under Section 147 is made out.

Therefore, two alternative cases are run by the petitioner. First, the proceedings were invalid on the ground that no reasons were supplied. Secondly, even it was assumed that the reasons were advanced by the department there was no cause of reopening the assessment under Section 147/148.

To deal with the submission of Mr. Dutta, learned advocate for the petitioner the facts in the background need to be noticed. For the assessment year 2009-10, the petitioner filed his return of income on 29th September, 2009 under Section 139 of the said Act showing a total income of Rs. 2,71,01,034/-. On 19th February, 2011 the department issued a letter to the petitioner stating that the return had been selected for scrutiny. On 7th June, 2011 the department issued a notice under Section 142(1) of the Act to the petitioner calling for certain information in a prescribed format. Such information was furnished by the petitioner on 17th June, 2011. On 24th August, 2011 further queries were raised by the department. Finally, on 28th December, 2011 the department completed the assessment under Section 143(3) of the Act and determined the total income of the petitioner at Rs. 3,14,06,070/- and computed the tax liability at Rs. 16,58,280/-.

Mr. Dutta relied on **Income-Tax Officer, Income-Tax-cum-Wealth-Tax Circle II, Hyderabad vs. Nawab Mir Barkat Ali Khan Bahadur** reported in **97 ITR 239**. It was a decision of the Hon'ble Supreme Court of India pronounced by Mr. Justice A.C. Gupta. In that case the status of four mohammedan ladies and their children were involved. Under three Deeds of trust of 1950, the relationship of the ladies and their children with the assessee were disclosed. There were further two trusts of 1957 which were not disclosed before the department. However, the deeds of 1950 conformed in all material particulars to those of 1957. His Lordship observed as follows:

> ***"Clause (a) of section 147 of the Income-tax Act, 1961, under which the assessments were sought to be reopened, so far as it is relevant for the present purpose, provides that if the Income-tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for any year, income chargeable to tax has escaped assessment for that year, he may assess or reassess such income for the assessment year concerned. The High Court held that the reasons assigned for reopening the assessments did not fall within the scope of omission or failure on the part of the assessee to disclose fully and truly all material facts, that all the material facts were before the***

department when it made the assessments in question and the trusts created in 1957 did not "throw a different light on the matters already disclosed".

……..

The High Court was right in holding that the Income-tax Officer had no valid reason to believe that the respondent had omitted or failed to disclose fully and truly all material facts and consequently had no jurisdiction to reopen the assessments for the four years in question. Having second thoughts on the same material does not warrant the initiation of a proceeding under section 147 of the Income-tax Act, 1961."

Mr. Dutta contended and in my opinion rightly, that during the 143(3) assessment, all information, documents and other records relating to the assessee for the relevant assessment year were before the Assessing Officer. The reasons which are advanced show discovery of new facts from the existing records. So the Assessing Officer wants to change his opinion regarding the assessment and to reopen it.

In my opinion "escapement of income" should be given a strict construction. Not only should it not be used to justify a change of view it should not be used to reopen an assessment on facts, information, documents which were before the Assessing Officer or could have been easily found by him while making the assessment. Otherwise, there would be no finality of assessment.

It will go on and on and might become a tool in the hands of the department to cause harassment to the assessee.

In this case, in the 143(3) proceedings all the data regarding the petitioner for the subject assessment year were before the Assessing Officer. Therefore, it cannot be said that there was “escapement of income” or that the reasons for believing that there was “escapement of income” were valid for the following reasons. In the case of **Amrit Feeds Ltd. vs. Assistant Commissioner of Income-Tax and Others** reported in **(2012) 344 ITR 187 (Cal)** a common question was involved in all the assessment years. In one of the years there was scrutiny assessment under Section 143(3). I had held that the issue regarding deduction under Section 80-IB of the Act could not be said to have escaped assessment. The question in the case was whether the writ petitioner/assessee was engaged in the production of the cattle and poultry feed. According to the revenue the production of cattle and poultry could not be classified as manufacture to enable the writ petitioner to obtain the benefit of Section 80-IB(5) of the Act. My ruling was that on the evidence before the Assessing Officer he had held the business of the assessee to be manufacture cattle and poultry feed. During the subsequent year he could not reopen the assessment on the same evidence. I had followed a judgment of Mr. Justice Chattopadhyay in **India Steamship Co. Ltd. vs. Joint Commissioner of Income-Tax and Others** reported in **275 ITR 155.**

Be that as it may according to the department by their letter dated 19th November, 2013, they proposed to serve the reasons upon the petitioner. It was allegedly sent by the departmental processserver on 22nd November, 2013. The department's version is that the assessee refused to accept the letter. The reasons were also sent by speed post. The petitioner refused to accept service and the envelope was returned to the department on 21st December, 2013. According to the petitioner the reasons were not received by him and that the department is wrongfully trying to assess his income under Section 147.

Let us assume that the reasons were received by the assessee objected to by him and those objections rejected by the department.

The department, cannot reassesses the case of the writ petitioner as the initiation of Section 147 proceedings was without jurisdiction, in view of the reasons given above.

This writ application is allowed by passing orders in terms of prayers (a) and (b) of the petition

Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(I. P. MUKERJI, J.)